UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

WYMAN GORDON PENNSYLVANIA, LLC	:	
	:	
	:	
AND	:	CASES 04-CA-182126,
	:	04-CA-186281, and
UNITED STEEL, PAPER AND FORESTRY,	:	04-CA-188990
RUBBER, MANUFACTURING, ENERGY,	:	
ALLIED-INDUSTRIAL AND SERVICE	:	
WORKERS INTERNATIONAL UNION,	:	
AFL-CIO/CLC	:	
	:	

RESPONDENT'S MOTION TO STRIKE
PARAGRAPHS 7, 8 AND 10
IN THE AMENDED CONSOLIDATED COMPLAINT

I. INTRODUCTION

Pursuant to § 102.24 of the National Labor Relations Board's ("Board") Rules and Regulations, Respondent Wyman Gordon Pennsylvania, LLC ("Respondent" or "Wyman Gordon"), by and through its undersigned counsel, hereby files this Motion to Strike the Amended Consolidated Complaint ("Motion").

II. PROCEDURAL HISTORY

On September 29, 2017, the Board filed a Consolidated Complaint alleging:

- The Employer's Handbook Policies – Confidentiality, Electronic Communications and Media Contact – violated the act (Para. 6);
- The Employer failed to meet at reasonable times by appearing late for negotiations on various dates (Para. 7);
- "At all material times prior to August 12, 2016, Respondent failed to either: (i) implement its established annual wage increases for Unit employees; or (ii) offer to bargain with the Union over the discretionary amount of the annual wage increases for Unit employees." (Para. 8);
- The Employer prohibited employees who had been performing light duty work from continuing to perform such work without prior notice and without affording the Union an opportunity to bargain. (Para. 9);

- "By letter dated August 12, 2016, the Union requested that the parties engage in bargaining over economic issues, including the Union's interim wage proposal"; this paragraph further alleged that the Employer failed and refused to bargain collectively over Vacation, Rights and Assignments, Holidays, Safety & Health and Timekeeping, as well as Seniority, New Classifications/Rates and non-economic components of Vacation and Holidays (Para. 10);
- The Employer failed to respond to the Union's information requests (Para. 11-13); and
- The Employer unlawfully withdrew recognition (Paras. 14-16).

The Employer answered and filed a motion for a bill of particulars on October 13, 2017. The Board was ordered to specifically plead, if so asserting, that the employee petition on which the Employer relied was tainted by the unfair labor practices alleged elsewhere in the complaint, and any other reason for which the withdrawal of recognition was unlawful.

When the Board failed to timely amend the Complaint pursuant to Section 10292 of the NLRB Casehandling Manual, the Employer filed a Motion to Strike on January 24, 2018. The Board was ordered to file an amended complaint no later than February 7, 2018 specifying which alleged violations and other matters it relies upon in contending that the Employer's withdrawal of recognition violated the Act.

Accordingly, the General Counsel filed its first amendment to the Consolidated Complaint on January 25, 2018 amending Paragraph 14 to specifically state that the Employer withdrew recognition of the Union notwithstanding that the conduct alleged in the Consolidated Complaint was unremedied, "thus tainting any alleged showing that the Union had lost majority support of the Unit."

Thereafter on February 13, 2018, the General Counsel filed a second amendment to the Consolidated Complaint removing the allegations related to the Employer's Electronic Communications and Media Contact policies, parsing out the General Counsel's allegation that the Employer failed to provide notice and opportunity to bargain over the Employer's annual wage

increase prior to August 1, 2016, and by deleting the assertion that the Employer withdrew recognition of the Union absent the results of an RDM or RD election.

On March 8, 2018, the General Counsel filed an Amended Consolidated Complaint in which it purported to "simplify the issues" by specifically pleading certain allegations. In fact, the Amended Consolidated Complaint appears to be an attempt to bring in through the back door claims that have either already been dismissed or never brought before the Board or investigated.

III. FACTUAL BACKGROUND

On April 9, 2014, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC (the "Union") filed a petition to represent all full and part time machinists and maintenance workers at Wyman Gordon Tru-Form. An election was held on May 21, 2014. Of the 47 potential bargaining unit members, 24 voted for the Union and 22 against; the Union won by one vote. The NLRB certified the Union on April 15, 2015.

Despite that the Employer offered to meet on numerous dates over the summer, the Union was not available and negotiations could not commence until September 17, 2015. The Parties agreed to ground rules at the first meeting, including that, because this was to be a first contract, they would negotiate language first, followed by the economic provisions. The Parties continued negotiating for fourteen (14) months, meeting twenty-five (25) times, exchanging numerous proposals and counter proposals on various topics and reaching nine (9) tentative agreements.

On November 23, 2016, an attorney from the National Right to Work Foundation sent a letter to Rick Grimaldi, the Employer's attorney and lead negotiator, enclosing a petition signed by twenty-three (23) of the then forty-three (43) bargaining unit members and demanding that the

Employer immediately withdraw recognition of the Union pursuant to *Dura Art Stone*, 346 NLRB 149 (2005). Accordingly, Mr. Grimaldi notified the Union on November 29, 2016.

IV. HISTORY OF UNFAIR LABOR PRACTICE CHARGES AT ISSUE

A. ULP No. 04-CA-182126 (filed: 8/15/2016; partially withdrawn: 10/31/2016)

On August 15, 2016, the Union filed an unfair labor practice charge claiming that the Employer "violated Section 8(a)(5) of the Act by discontinuing its established practice of granting annual wage increases to bargaining unit employees without providing notice or an opportunity to bargain to [the Union]" and "violated Section 8(a)(1) of the Act by attributing the Company's failure to pay annual wage increase as it ordinarily does to the ongoing negotiations with [the Union], thereby coercing and restraining them in the exercise of rights protected by Section 7."

As a preliminary matter, the issue to be negotiated between the Parties was the *amount* of the wage increase, which had previously been discretionary, not based on any particular formula or criteria. The Employer made clear that, once the Parties reached agreement, any such increase would be retroactive to August 1, 2016.

As set forth in the Company's position statement in response to the Charge, despite that the Parties discussed the annual wage increase during their session on August 12, 2016, and agreed to continue negotiations over the annual wage increase at the next scheduled session on August 26, 2016, the Union filed this Charge the following business day. Further, as part of its response, the Employer provided the Board with its response to the Union's requests for information demonstrating that it had, in fact, provided the Union with responsive information regarding, among other things, wages

On October 31, 2016, prior to the withdrawal of recognition, the Regional Director sent a letter to the Employer's attorney stating:

> This is to advise that I have approved the Charging Party's request to withdraw the portion of the charge alleging that the Employer violated the Act by not distributing annual wage increases on August 1, 2016 and by telling an employee that the wage increase was not distributed yet because the amount of the increase was still being negotiated with the Union.
>
> The remaining allegations that the Employer violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with a notice or opportunity to bargain over the amount of the increase prior to August 1, 2016 remains pending.

B. ULP No. 04-CA-186281 (filed: 10/17/2016; partially dismissed & withdrawn: 1/31/2017)

On October 17, 2016, the Union filed an unfair labor practice charge alleging:

> 1) Since about October 12, 2016, the Company has violated Sections 8(a)(1) and 8(a)(5) of the Act by discontinuing its light duty program for bargaining unit employees without providing notice or an opportunity to bargain to [the Union].
>
> 2) Since about October 12, 2016, the Company has violated Sections 8(a)(1) and 8(a)(3) of the Act by discontinuing the light duty assignments of employees to discriminate against them on the basis of support for [the Union].
>
> 3) Since about April 17, 2016, the Company has violated Section 8(a)(1) of the Act by maintaining policies regarding computer and social media use tending to coerce and restrain employees in the exercise of rights protected by Section 7.
> 4) Since August 12, 2016, the Company has violated Sections 8(a)(1) and 8(a)(5) of the Act by failing and refusing to provide (and/or unreasonably delaying in providing) information relevant to collective bargaining to [the Union}.

In its response to this Charge, the Employer explained that the Union's allegations relating to the light duty policy were, at the time the Union filed the Charge, moot. Indeed, at its October 26, 2016, the Union explicitly stated, "With respect to the Light Duty, it looks like you put everyone back, if so I don't need that information." The Employer also once again provided copies of correspondence and documents evidencing its responses to the Union's continuous information requests.

Thereafter, on January 31, 2017, the Regional Director approved the withdrawal of "the portion of the charge alleging that [the Employer] violated Section 8(a)(1) and (3) of the Act by discriminatorily making changes to the light duty program in retaliation for Union activity. Further, the Regional Director dismissed "the portion of the charge alleging that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to provide financial information or responses to [the Union] responsive to the Union's September 6, 2016 request." The Regional Director stated that, while the Employer "may have indicated its reluctance to pass along increases in operating costs to customers and its desire to 'remain competitive' …. [I]n these circumstances, those statements were not tantamount to a claim of an inability to pay or a claim that the Employer would not be profitable if it agreed to the Union's proposals." The Regional Director found, therefore, that the Employer was not obligated to provide the financial information originally requested by the Union on September 6 … and thus did not violate Section 8(a)(5) of the Act." The Union appealed and the Office of Appeals sustained the appeal, finding that the Employer "arguably" violated the Act by not providing certain Employer product and competitor information. The Office of Appeals remanded this issue for determination by an administrative law judge.

C. ULP No. 04-CA-188990 (filed: 11/30/2016)

On November 30, 2016, in response to the Employer's withdrawal of recognition of the Union on November 29, 2016, the Union filed an unfair labor practice charge alleging:

1) The Company maintained handbook policies during the 10(b) period that were in violation of the Act, including the confidentiality policy.

2) The Company failed to bargain in overall good faith.

3) The Company refused to meet at reasonable times.

4) The Company refused to bargain with respect to certain mandatory subjects of bargaining.

5) The Company violated the Act on June 1, 2016 by implementing changes to healthcare premiums, prior to impasse.

6) The Company violated the Act by paying quarterly cash bonuses without notice and opportunity to bargain over the discretionary components.

7) The Company violated the Act on October 18, 2016 by singling out employees for discipline on the basis of participation in the Union.

8) The Company violated the Act by withdrawing recognition of the Union.

The Board further clarified the Union's allegations in its December 16, 2016 letter requesting a response to the Charge:

1) Continued maintenance of the "Confidentiality Statement or Wyman-Gordon" policy in violation of Section 8(a)(1) of the Act;

2) During the six-month period immediately preceding the filing of the charge, the Employer failed to bargain in overall good faith with the Union in violation of Section 8(a)(5) and (1) of the Act;

3) During the six-month period immediately preceding the filing of the charge, the Employer refused to meet at reasonable times to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act;

4) Since on or about August 12, 2016, the Employer refused to bargain certain mandatory subjects of bargaining despite repeated requests by the Union in violation of Section 8(a)(5) and (1) of the Act;

5) On June 1, 2016, the Employer implemented, prior to impasse, changes to employee healthcare premiums without the agreement of the Union in violation of Sections 8(a)(5) and (1);

6) On August 15 and October 25, 2016, the Employer paid quarterly each bonuses that included discretionary components without offering notice and an opportunity to bargain to the Union in violation of Section 8(a)(5) and (1) of the Act;

7) On or about October 18, 2016, the Employer issued verbal written warnings to employees Chad Palmer and Gerald Ziminskas in retaliation for their Union actions I violation of Section 8(a)(3) and (1) of the Act;

8) On November 29, 2016, the Employer withdrew recognition of the Union on the basis of an employee petition tainted by its serious unfair labor practices an [*sic*] without petitioning for an NLRB election in violation of Section 8(a)(5) and (1) of the Act.

Again, the Employer provided a detailed position statement in response to the Charge, along with copies of the bargaining session meeting minutes demonstrating that: the Company always bargained in good faith; it was the Union – not the Company – that refused to meet at reasonable times; pursuant to the bargaining rules, it was not yet appropriate to bargain with respect to certain mandatory subjects; the changes to the healthcare premiums were negotiated; and the QCBs were consistent with past practices and the Company did not want to encounter yet another situation where the Union held up financial remuneration to the employees and then filed a ULP claiming the Company was withholding benefits or suspending past practices.

The Regional Director partially dismissed the Charge, stating:

> Based on the investigation, I have decided to dismiss the portions of the charge alleging that the Employer violated Section 8(a)(1) and (5) of the Act by making unilateral changes to the employee health care premiums in June 2016, paying Quarterly Cash Bonuses to employees on August 15 and October 26, 2016 without bargaining over discretionary components of the bonuses, and failing to bargain in overall good faith with [the Union].

The Regional Director also dismissed the portion of the charge alleging that the Employer violated Section 8(a)(1) and (3) of the Act by singling out two employees for discipline in retaliation for their Union activities.

The Regional Direct noted:

> Regarding the alleged unilateral changes to health insurance premiums, the investigation revealed that on May 16 and 26, 2016, the Employer and Union bargained over changes to the premiums, although no agreement was reached. On June 3, 2016, the Employer announced the amount of the premium changes to the employees, and informed employees and the Union that those changes were subject to continued bargaining with the Union and

> could change depending on the outcome of bargaining. On June 13, 2016, the Employer offered to continue bargaining with the Union over the healthcare premiums. It is undisputed that the Union chose not to bargain further on this issue and indicated on June 13 and times thereafter that it accepted the Employer's health insurance premium increase.

Further, the Regional Director found that the Quarterly Cash Bonuses (unlike the annual wage increases) are based on an established formula and there is insufficient discretion in the formula itself to require bargaining with the Union.

Significantly, with respect to the allegation that the Employer failed to bargain in overall good faith, the Regional Director wrote:

> The Union contended during the investigation that the Employer's bad faith was evidenced by its cancellation of eight bargaining sessions, obstruction in scheduling bargaining sessions, excessive causes, and "unreasonable" and/or regressive bargaining proposals with respect to the Union Security, Plant Rules, Job Posting and Bidding and Management Rights, Layoffs, and Seniority provisions. The investigation disclosed that throughout bargaining the Employer adhered to the parties' bargaining ground rules by scheduling bargaining sessions in advance and providing at least 24-hours' notice of any cancellations. Moreover, five of the eight bargaining cancelled sessions were rescheduled within a week of the originally scheduled date. While the Union asserted that the Employer was aware of the Union's Lead Negotiator Joe Pozza's busy schedule and asserted that every cancelled session ran the risk of becoming a lost session, it is well settled that a party acts at its peril when it chooses as a bargaining agent someone who is encumbered by other conflicts which limit his availability.

Further, with respect to caucusing, the Regional Director found that:

> The parties had agreed in their bargaining ground rules that "each party has the right to caucus at any time …" and, although the ground rules also indicated that "the requesting party will inform the other party of the anticipated length of the caucus," the evidence revealed that the parties did not always adhere to this portion of the ground rules by informing each other of how long each caucus should last. Thus, though the Union felt that certain of the Employer's caucuses lasted longer than the Union felt necessary, there is insufficient evidence that the Employer was engaging in bad faith bargaining as a result of its caucuses.

Most significantly, the Regional Director found that, with regard to bargaining over the Seniority and Layoffs provisions, "there is no legal requirement that an employer has to agree to seniority

as a deciding factor for layoffs, job bidding, or any other term, and the Employer was simply seeking to include other factors in addition to seniority."

The Regional Director wrote, "I find the Employer engaged in hard, not regressive, bargaining and did not engage in unlawful bad faith bargaining in violation of Section 8(a)(5) of the Act.

The Union appealed this dismissal. The appeal was denied by the Office of Appeals "substantially for the reason in the Regional Director's letter of March 1, 2017." Further, the Office of Appeals concluded "that the Regional Office conducted the investigation in accordance with the Agency's policies and procedures. The Regional Director properly based the dismissal on the evidence presented by the parties and the case law." The Office of Appeals affirmed, "[W]e do not find that the Employer engaged in bad faith bargaining."

V. MOTION TO STRIKE ALLEGATIONS IN THE AMENDED CONSOLIDATED COMPLAINT

On March 8, 2018, the General Counsel filed an Amended Consolidated Complaint. The Amended Consolidated Complaint includes allegations regarding the Confidentiality Statement, the Light Duty Policy, the Employer's failure to respond to the Union's information requests and, at issue here, continued allegations in Paragraph 7 that the Employer "failed and refused to meet at reasonable times with the Union to negotiate a collective-bargaining agreement by arriving late on [various dates]" and allegations in Paragraph 10 that the Employer failed and refused to provide responses to the Union's initial proposal in which it appears that every article in the Union's initial proposal is identified except for those provisions upon which the Parties reached tentative agreement. These allegations should be stricken because the Regional Director has already

dismissed these claims and/or because they are not properly before the Board as they were not part of any unfair labor practice charge and/or investigated by the Board.

A. Allegations in Paragraph 7 that the Employer Failed and Refused to Meet at Reasonable Times with the Union Should Be Stricken.

With respect to Paragraph 7 of the Complaint, the Regional Director already specifically addressed the Union's allegations that the Employer failed to meet at reasonable times, in the dismissal of the bad faith bargaining portion of the charge. Specifically, in his dismissal, the Regional Director wrote that, "The Union contended during the investigation that the Employer's bad faith was evidenced by its cancellation of eight bargaining sessions, obstruction in scheduling bargaining sessions, excessive caucuses…. The investigation disclosed that throughout bargaining the Employer adhered to the parties' bargaining ground rules by scheduling bargaining sessions in advance and providing at least 24-hours' notice of any cancellations. Moreover, five of the eight bargaining cancelled sessions were rescheduled within a week of the originally scheduled date." Further, the Regional Director found that the Parties "had agreed in their bargaining ground rules that 'each party has the right to caucus at any time,'" ultimately finding that "there is insufficient evidence that the Employer was engaging in bad faith bargaining as a result of the caucuses."

Nevertheless, the General Counsel attempts to argue that the Employer failed to meet at reasonable times because the Employer was allegedly late on several occasions, ignoring the Regional Director's dismissal and ample evidence provided to the Board that, to the extent bargaining sessions started late, it was due to caucusing, that it was the Union who most often ended bargaining sessions even when the Employer offered to keep going and the Union failed or refused to meet on numerous dates offered by the Employer.

These allegations were investigated "in accordance with the Agency's policies and procedures" and properly dismissed and, therefore, should not be included in the Amended Consolidated Complaint. Accordingly, this paragraph should be stricken.

B. Paragraph 8 of the Amended Consolidated Complaint Should be Stricken.

The General Counsel amended Paragraph 8 of the Amended Complaint to allege that the Employer failed to provide bargaining unit employees with an annual wage increase without providing notice and negotiating with the Union. In its opposition to the Employer's Petition to Revoke the NLRB's Subpoena, the General Counsel articulated this claim as the Employer "[refused] to provide employees with an annual raise it had given employees for more than ten years without first providing the Union with notice and an opportunity to bargain over the amount of the raise." That is not the claim at issue. The Regional Director approved the withdrawal of the portion of the charge alleging that the Employer violated the Act by not distributing annual wage increases on August 1, 2016. Accordingly, to the extent Paragraph 8 is read or intended to include any allegation that the Employer violated the Act by failing to distribute an annual wage increase on August 1, 2016, it must be stricken.

C. Paragraph 10 of the Amended Consolidated Complaint Should be Stricken.

In the Consolidated Complaint, the General Counsel alleged that the Employer failed to respond to the Union's comprehensive proposal with respect to the following provisions: Vacation, Rights and Assignments, Holidays, Safety & Health and Timekeeping, as well as Seniority, New Classifications/Rates and non-economic components of Vacation and Holidays. In its position statement, the Employer provided ample evidence of the lengthy negotiations that took place between it and the Union. By way of example, the Employer provided eight proposals with respect to Seniority.

In the Amended Consolidated Complaint, the General Counsel removed Seniority and added thirteen provisions, seemingly listing every provision for which the Parties had not reached a tentative agreement (except for Seniority), despite the ample evidence provided by the Employer. Further, the Regional Director has already acknowledged that the Employer bargained over several of these provisions, including Article X (Insurance Benefits) ("On June 13, 2016, the Employer offered to continue bargaining with the Union over the healthcare premiums. It is undisputed that the Union chose not to bargain further on this issue and indicated on June 13 and times thereafter that it accepted the Employer's health insurance premium increase.") and Article XXIV (Layoffs & Severance Policy) ("With regard to bargaining over the Seniority and Layoffs provisions, there is no legal requirement that an employer has to agree to seniority as a deciding factor for layoffs, job bidding or any other term, and the Employer was simply seeking to include other factors in addition to seniority.").

The General Counsel seems to be improperly attempting to resurrect the bad faith bargaining claim by identifying various provisions while ignoring other provisions where the Parties exchanged numerous proposals and counter proposals and/or reached tentative agreement, including:

- Article I (Recognition)
- Article II (Checkoff)
- Article III (Union Security)
- Article IV (Rights of Management)
- Article V (Grievance) (tentative agreement reached)
- Article VI (Impartial Arbitration)
- Article VII (Strikes and Lockouts)
- Article XIV (Seniority)
- Article XV (Job Posting) ("the parties never reached a tentative agreement on this provision, and while the Employer did propose different language in in its fourth proposal on this subject than it did in prior proposals, that alone does not establish regressive bargaining")
- Article XVI (Death in the Family) (tentative agreement reached)
- Article XXI (Jury Duty) (tentative agreement reached)

- Article XXII (Shoe Allowance) (related to Protective Equipment)
- Article XXVI (Payday) (tentative agreement reached)
- Article XXX (EAP) (tentative agreement reached).

Additionally, the Parties reached tentative agreement on Military Leave, Non-Discrimination and Flu Shots.

Because the Regional Director has already determined that the Employer did not engage in bad faith bargaining, the General Counsel should not be permitted to attempt to revive that claim here.

VI. CONCLUSION

WHEREFORE, Respondent respectfully requests that the Division of Judges strike the allegations in ¶¶ 7, 8 and 10 of the Amended Consolidated Complaint.

Dated: March 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2018, I e-filed the foregoing **RESPONDENT'S MOTION TO STRIKE PARAGRAPHS 7, 8 AND 10 IN THE AMENDED CONSOLIDATED COMPLAINT** with the Division of Judges, and served a copy of the foregoing document via e-mail to all parties in interest, as listed below:

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